Neutral Citation Number: [2022] EWCA Civ 302

Case No: CA-2021-000740
(Formerly A2/2021/1578)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)H

Mr David Halpern QC (Sitting as a Deputy High Court Judge)

[2021] EWHC 2163 (Ch)
Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 09/03/2022

Before :

LADY JUSTICE ASPLIN

LORD JUSTICE POPPLEWELL
and

LORD JUSTICE WILLIAM DAVIS

- -

IN THE MATTER OF IPAGOO LLP (IN ADMINISTRATION)

Between :

JASON DANIEL BAKER AND GEOFFREY PAUL ROWLEY	**Applican** **Responde**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**Intervene** **Appellar**

- -
- -

Felicity Toube QC (instructed by **The Financial Conduct Authority**) and **Dr Riz Mokal** for the **Appellant**

Jack Watson (instructed by **Faegre Drinker Biddle and Reath LLP**) for the **Respondents**

Hearing dates: 9-10 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, and release to BAILII. The date and time for hand down is deemed to be 11.00 a.m. on Wednesday 9 March 2022.

Lady Justice Asplin :

1.

This appeal and cross-appeal are concerned with the proper construction of the Electronic Money Regulations 2011 (the "EMRs") and, in particular, with the status of funds received by an electronic money institution (an "EMI") from electronic money holders in the event of its insolvency.

2.

In May 2018, Ipagoo LLP ("ipagoo") was authorised by the Financial Conduct Authority (the "FCA") pursuant to the EMRs to issue electronic money ("e-money") and to provide multi-country and cross-currency payment account services and was regulated by the FCA accordingly. It offered a payment card and mobile telephone "app" which enabled customers to manage accounts in multiple currencies and carry out international transfers of funds in real time in multiple EU countries. It became insolvent and went into administration on 1 August 2019 and is prohibited from conducting any business.

3.

In April 2021, Jason Baker and Geoffrey Rowley, the joint administrators (the "Administrators") applied for directions about how certain funds held by ipagoo should be distributed and, in particular, whether those funds are held on trust pursuant to the EMRs. The FCA intervened in the application as amicus curiae at the invitation of the Administrators.

4.

David Halpern QC, sitting as a deputy High Court judge, handed down judgment on 30 July 2021 [2021] EWHC 2163 (Ch). In summary, he held that: save in one respect, (see below) regulations 20-22 and 24 of the EMRs provide the level of protection for funds received from electronic money holders required by the European directives which the EMRs implement and that there is no basis for implying a trust of the funds ([49] –[50]); regulation 24 must override the priority rules which would otherwise apply on ipagoo's insolvency ([51]); and that in order to comply with Article 10 of EU Second Payment Services Directive (2015/2366/EU) (the "PSD2"), it is necessary to treat the "asset pool" defined in regulation 24 so as to include a sum equal to all the funds received from electronic money holders which ought to have been but had not been safeguarded under the remainder of the relevant regulations ([52] - [55]). In other words if such funds, referred to in the EMRs as "relevant funds", or part of them, had not been safeguarded, on the insolvency of an EMI a sum equal to the shortfall must be added to the "asset pool" from ipagoo's general estate, to be distributed in accordance with regulation 24.

5.

The FCA appeals on the grounds that the judge erred in law: in failing to conclude that "relevant funds" are subject to a statutory trust pursuant to the EMRs; in finding that the safeguarding requirements in the PSD2 and the Electronic Money Directive (2009/110/EC) (the "EMD"), as implemented in the EMRs, could be given due effect without a statutory trust; and in construing the EMRs as overriding aspects of insolvency and property law by deciding that assets which would

otherwise be applied towards discharging the claims of secured creditors or those benefitting from insolvency set-off be appropriated for the benefit of electronic money holders to the extent of any shortfall in the "asset pool".

6.
To put the matter shortly, the FCA's position is that: the EMD and PSD2 (together referred to as the "Directives") require the EMRs to be construed in a manner which results in "relevant funds" being subject to a statutory trust from the moment they are received by an EMI and that their proceeds are traceable, whether or not the funds were segregated in the first place or subsequently ceased to be so. They say that that is necessary in order to provide the level of protection envisaged and required by the Directives and that the same applies to any insurance policy which is purchased pursuant to the safeguarding provisions in regulation 22 of the EMRs and to the proceeds of such a policy. Otherwise, the relevant funds are unprotected if the EMI fails to take the safeguarding steps it ought to. The FCA also says that the judge was wrong to hold that the asset pool should be extended by recouping monies from the general estate. They say that such a mechanism overrides insolvency and property law and is unnecessary if a statutory trust arises in any event.

7.
The Administrators were neutral as to the outcome of the application for directions before the judge and remain so on appeal. However, in order that all arguments should be canvassed before the court, the judge ordered that in any appeal the Administrators should represent the interests of ipagoo's creditors in so far as their claims do not relate to the issuance of electronic money and that the Administrators have permission to cross-appeal in relation to the Declarations. We are grateful to Mr Watson, who appears on behalf of the Administrators, for his submissions made on behalf of the Administrators in their representative capacity. We are happy to continue the representation order made by the judge.

8.
In summary, the grounds of the Administrators' cross-appeal are that although the judge found correctly that the EMRs do not create a statutory trust in relation to relevant funds, he erred in holding that the "asset pool" defined in regulation 24 of the EMRs should be extended to include a sum equal to any relevant funds which should have been, but were not safeguarded in accordance with regulations 20 – 22 of the EMRs and that accordingly, electronic money holders have a statutory right to be paid out of relevant funds in priority to all other creditors.

9.
The Administrators (in their representative capacity) contend, therefore, that the EMRs give electronic money holders a statutory right to be paid out of the "asset pool"; and if no such funds, or insufficient funds have been safeguarded, the electronic money holders rank merely as unsecured creditors and that the high level of protection required by PSD2 is satisfied by the statutory regime. Their alternative argument is that the judge was right both that no statutory trust is necessary and in relation to recouping any shortfall in the asset pool from the general estate.

Relevant background

10.
It is not in dispute that EU law draws a distinction between payment institutions and EMIs on the one hand and credit institutions, including banks, on the other. Only credit institutions can take deposits and pay interest. EMIs are not permitted to take deposits nor are they permitted to award interest. Ipagoo did neither. It did receive a total of Euros 3,810,972, £235,854 and US$265,980 from

electronic money holders, however. It has not been possible to determine whether any of these funds were safeguarded in the manner required by the EMRs. It seems that there has been serious non-compliance with the requirements of the EMRs. As a result, the Administrators sought the directions of the Court.

11.
As Ms Toube QC, who appeared with Dr Riz Mokal on behalf of the FCA, pointed out, the issues with which we are concerned potentially have wide significance. It is estimated that a total of £18billion have been received by EMIs and payment institutions registered with the FCA.

The Regulatory Regime

12.
I shall begin by summarising the relevant parts of the EMRs before turning to the issues to be decided.

The EMRs

13.
"Electronic money" is defined in regulation 2 of the EMRs, as "electronically (including magnetically) stored monetary value as represented by a claim on the electronic money issuer which - (a) is issued on receipt of funds for the purpose of making payment transactions; (b) is accepted by a person other than the electronic money issuer; (c) is not excluded by regulation 3". An EMI is defined in the same regulation as "an authorised electronic money institution or a small electronic money institution".

14.
The EMRs contain detailed provisions for the authorisation and registration of EMIs. The safeguarding requirements which are central to this appeal, are contained in regulations 20 – 22 and 24. Regulation 20, where relevant, is as follows:

"20. Safeguarding requirements

(1) Electronic money institutions must safeguard funds that have been received in exchange for electronic money that has been issued (referred to in this regulation and regulations 21 and 22 as "relevant funds").

(2) Relevant funds must be safeguarded in accordance with either regulation 21 or regulation 22.

(2A) An electronic money institution may safeguard certain relevant funds in accordance with regulation 21 and the remaining relevant funds in accordance with regulation 22.

(3) Where—

(a) only a proportion of the funds that have been received are to be used for the execution of a payment transaction (with the remainder being used for non-payment services); and

(b) the precise portion attributable to the execution of the payment transaction is variable or unknown in advance,

the relevant funds are such amount as may be reasonably estimated, on the basis of historical data and to the satisfaction of the Authority, to be representative of the portion attributable to the execution of the payment transaction.

(4) Funds received in the form of payment by payment instrument need not be safeguarded until they —

(a) are credited to the electronic money institution's payment account; or

(b) are otherwise made available to the electronic money institution,

provided that such funds must be safeguarded by the end of five business days after the date on which the electronic money has been issued.

. . . ”

15.
Regulation 21 is headed “Safeguarding Option 1” and, where relevant, is in the following terms:

“(1) An electronic money institution must keep relevant funds segregated from any other funds that it holds.

(2) Where the institution continues to hold the relevant funds at the end of the business day following the day on which they were received it must—

(a) place them in a separate account that it holds with an authorised credit institution or the Bank of England; or

(b) invest the relevant funds in secure, liquid, low-risk assets (“relevant assets”) and place those assets in a separate account with an authorised custodian.

(3) An account in which relevant funds or relevant assets are placed under paragraph (2) must—

(a) be designated in such a way as to show that it is an account which is held for the purpose of safeguarding relevant funds or relevant assets in accordance with this regulation; and

(b) be used only for holding those funds or assets, or for holding those funds or assets together with proceeds of an insurance policy or guarantee held in accordance with regulation 22(1)(b).

(4) No person other than the electronic money institution may have any interest in or right over the relevant funds or the relevant assets placed in an account in accordance with paragraph (2) (a) or (b) except as provided by this regulation.

…

(5) The institution must keep a record of—

(a) any relevant funds segregated in accordance with paragraph (1);

(b) any relevant funds placed in an account in accordance with paragraph (2)(a);

(c) any relevant assets placed in an account in accordance with paragraph (2)(b)

…”

16.
Regulation 22 is headed “Safeguarding option 2” and provides, where relevant, as follows:

“(1) An electronic money institution must ensure that—

(a) any relevant funds are covered by—

(i) an insurance policy with an authorised insurer;

(ii) a comparable guarantee from an authorised insurer; or

(iii) a comparable guarantee from an authorised credit institution; and

(b) the proceeds of any such insurance policy or guarantee are payable upon an insolvency event into a separate account held by the electronic money institution which must—

(i) be designated in such a way as to show that it is an account which is held for the purpose of safeguarding relevant funds in accordance with this regulation; and

(ii) be used only for holding such proceeds, or for holding those proceeds together with funds or assets held in accordance with regulation 21(3).

(2) No person other than the electronic money institution may have any interest or right over the proceeds placed in an account in accordance with paragraph (1)(b) except as provided by this regulation."

17.
Regulation 24 is concerned with the position of electronic money holders in the event of the insolvency of the EMI. It provides, where relevant:

"24. Insolvency events

(1) Subject to paragraph (2), where there is an insolvency event … —

(a) the claims of electronic money holders are to be paid from the asset pool in priority to all other creditors; and

(b) until all the claims of electronic money holders have been paid, no right of set-off or security right may be exercised in respect of the asset pool except to the extent that the right of set-off relates to fees and expenses in relation to operating an account held in accordance with regulation 21(2)(a) or (b) or … 22(1)(b).

(2) The claims referred to in paragraph (1)(a) shall not be subject to the priority of expenses of an insolvency proceeding except in respect of the costs of distributing the asset pool.

(3) An electronic money institution must maintain organisational arrangements sufficient to minimise the risk of the loss or diminution of relevant funds or relevant assets through fraud, misuse, negligence or poor administration.

(4) In this regulation—

"asset pool" means—

(a) any relevant funds segregated in accordance with regulation 21(1);

(b) any relevant funds held in an account accordance with regulation 21(2)(a);

…

(c) any relevant assets held in an account in accordance with regulation 21(2)(b);

(d) any proceeds of an insurance policy or guarantee held in an account in accordance with regulation 22(1)(b).

. . .

"insolvency event" has the same meaning as in regulation 22;

...

"security right" means—

security for a debt owed by an electronic money institution and includes any charge, lien, mortgage or other security over the asset pool or any part of the asset pool ...'.

18.
Regulation 72 provides that a contravention of the requirements imposed by regulations 20, 21, 22 or 24 "is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to action for breach of statutory duty".

19.
The issuance and redeemability of electronic money is dealt with in regulation 39. It provides as follows:

"39. Issuance and redeemability

An electronic money issuer must-

(a) on receipt of funds, issue without delay electronic money at par value; and

(b) at the request of the electronic money holder, redeem-

(i) at any time; and

(ii) at par value,

the monetary value of the electronic money held."

20.
Redemption is dealt with in more detail in regulation 40. It provides that the EMI "must ensure (a) that the contract between the electronic money issuer and the electronic money holder clearly and prominently states the conditions of redemption, including any fees relating to redemption; and (b) that the electronic money holder is informed of those conditions before being bound by any contract". Regulation 41(1) provides that redemption may be subject to a fee only where the fee is stated in the contract and redemption is requested before the termination of the contract, the contract contains a termination date and the electronic money holder terminates the contract before that date or redemption is requested more than a year after the date of termination of the contract.

21.
Regulation 42 deals with the amount of redemption. Regulation 42(1) provides that where redemption is requested before the termination of the contract the EMI "must redeem the amount so requested subject to any fee imposed in accordance with regulation 41". Regulation 42(2) deals with requests for redemption made "on or up to one year after the date of the termination of the contract". In those circumstances, the EMI must redeem the total monetary value of the electronic money held, or if the EMI carries out any business activities other than the issuance of electronic money and it is not

known in advance what proportion of the funds received by it is to be used for electronic money, all the funds requested by the electronic money holder. An EMI is not required, however, to redeem the monetary value of electronic money where the request for redemption is made more than six years after the termination of the contract (regulation 43).

22.
The EMRs also include provisions in relation to accounting and statutory audit (regulation 25), record-keeping (regulation 27 and 31A) amongst many other things.

23.
Lastly, for these purposes at least, the FCA's powers and obligations in this regard are contained in Part 6 of the EMR. In summary, the FCA must maintain arrangements designed to enable it to determine whether EMIs are complying (inter alia) with the safeguarding requirements imposed by regulations 20 – 22; for enforcing those requirements; and for receiving complaints from electronic money holders about EMIs' non-compliance with them: regulations 48 and 58. The FCA's power to require EMIs to report to it about their compliance with the EMRs is supported by various substantive powers directed at enforcement – including the power to publish a statement that an EMI has contravened any requirement imposed on it; to impose financial penalties; to suspend an EMI's authorisation, or otherwise restrict its activities as an electronic money issuer for up to 12 months; and to apply to the court for an injunction restraining a prospective or ongoing breach of the EMRs or mandating steps to remedy a breach: regulations 49 – 54. The FCA may also order the EMI to make restitution to an 'appropriate person' where, in consequence of breaching a requirement imposed on it, the EMI has gained a profit attributable to that person; or caused that person to suffer loss, or to be otherwise adversely affected: regulation 55. The FCA, furthermore, has the power to bring criminal proceedings against EMIs for any of the offences created by Part 7 of the EMRs: regulation 69. Part 2 of the EMRs also includes the FCA's obligation to maintain a register of authorised EMIs, amongst other things.

Framework for deciding the issues on appeal

24.
The EMRs were made in order to fulfil the requirements of the EMD and were made pursuant to section 2(2) of the European Communities Act 1972. As a result, the EMRs constitute "EU-derived domestic legislation" and accordingly, continue to have effect in domestic law by virtue of section 2(2) European Union (Withdrawal) Act 2018. Furthermore, in accordance with section 6(3)(a) of that Act, it remains the position that they must be construed in accordance with "retained case law" and "retained principles of EU law".

25.
It is necessary to interpret the EMRs in the light of the EMD and the PSD2 to the extent that it is incorporated in the EMD by reference and, as far as possible, in order to give effect to the Directives. As Arden LJ pointed out at [59] in the Lehman Bros International (Europe) v CRC Ltd [2011] BusLR 277, it is important to recall the nature of an EU Directive. Article 288TFEU states that: "A Directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods."

26.
Further, although they are not binding, when seeking to interpret an EU Directive, the court may take account of the Recitals in the Preamble which may cast light on the interpretation of the Articles:

Casa Fleischhandel v Bundesanstalt fur Landwirtschaftliche Marktordnung [1989] ECR 2789 at [31], ECJ.

27.
When interpreting the EMRs it is necessary to adopt the approach outlined in the Lehman case in the Supreme Court (Lehman Brothers International (Europe) (a company) (in administration) and another [2012] 3 All ER 1, [2012] UKSC 6) at [131]. First, the EMD (and PSD2 to the extent that it is incorporated by reference) must be interpreted in accordance with the principles of European Union law. Secondly, the EMRs must then be interpreted in accordance with domestic law principles in the light of the meaning of the Directives in order to achieve conformity with the provisions and principles of the EMD. Lord Dyson went on at [131] to approve Briggs J's approach to the exercise at first instance (at [2010] 2 BCLC 301 at [57]) that:

". . . [D]omestic legislation which is made for the purposes of fulfilling the requirements of EU law contained in a Directive must be interpreted in accordance with the following principles: (i) it is not constrained by conventional rules of construction; (ii) it does not require ambiguity in the legislative language; (iii) it is not an exercise in semantics or linguistics; (iv) it permits departure from the strict and literal application of the words which the legislature has elected to use; (v) it permits the implication of words necessary to comply with Community law; and (vi) the precise form of the words to be implied does not matter."

28.
Before turning to the EMD it seems to me that it is also important to bear in mind some of the general considerations which Arden LJ considered were relevant when seeking to construe Chapter 7 of the Client Assets Sourcebook ("CASS 7") in the Lehman case in the Court of Appeal. She noted that the interpretation of CASS 7 in that case, required "assessing the provisions as a whole and testing preliminary conclusion on one provision by reference to the rest of the relevant provisions." ([57]). It required a "holistic and iterative approach to interpretation" ([57]). She went on to note that CASS 7 is a set of statutory rules for market participants and investors and, accordingly, must be given a sensible and practical construction, grounded in reality ([58]). It seems to me that all of those general principles, which were not disapproved in the Supreme Court, apply equally to the interpretation of the EMRs.

The EMD

29.
It is necessary, therefore, to construe the relevant provisions of the EMD and the PSD2, to the extent that it is necessary. I mention PSD2 despite the fact that Article 7 of the EMD makes express reference to the Directive (2007/64/EC), the Payment Service Directive ("PSD1"). PSD1 has been superseded by PSD2 and Article 114 of PSD2 states that any reference to PSD1 shall be construed as a reference to PSD2.

30.
A number of the recitals to the EMD are relevant. It is stated in recital 11 that "[T]here is a need for a regime for initial capital combined with one for ongoing capital to ensure an appropriate level of consumer protection and the sound and prudent operation of electronic money institutions." Having addressed the capital requirements in more detail, the recital goes on to state that "[I]n addition, provision should be made for electronic money institutions to be required to keep the funds of electronic money holders separate from the funds of the electronic money institution for other business activities. …"

31.
Having made clear at recital 13 that the issuance of electronic money does not constitute deposit-taking and that electronic money is to be used as a means of making payments and "not as a means of saving" it is expressly stated that EMIs should not be allowed to grant credit or interest. Recital 14, however, refers to the fact that it is necessary to preserve a level playing field between EMIs and credit institutions with regard to the issuance of electronic money to ensure fair competition for the same service. It is stated that that should be achieved by "balancing the less cumbersome features of the prudential supervisory regime applying to electronic money institutions against provisions that are more stringent than those applying to credit institutions, notably as regards the safeguarding of the funds of an electronic money holder …'.

32.
Recital 18 is concerned with the redeemability of electronic money. It states, amongst other things, that redemption, in general, should be granted free of charge and that: "[R]edeemability does not imply that the funds received in exchange for electronic money should be regarded as deposits or other repayment funds for the purposes of Directive 2006/48/EC." This is reflected in Article 6(3) which provides that "[A]ny funds received by [EMIs] from the electronic money holder shall be exchanged for electronic money without delay" and "[S]uch funds shall not constitute either a deposit or other repayable funds received from the public . . .".

33.
Article 7 is of prime importance. I will set out the relevant paragraphs in full:

"'Article 7 – Safeguarding Requirements"

1.
Member States shall require an electronic money institution to safeguard funds that have been received in exchange for electronic money that has been issued, in accordance with Article 9(1) and (2) of Directive 2007/64/EC. Funds received in the form of payment by payment instrument need not be safeguarded until they are credited to the electronic money institution's payment account or are otherwise made available to the electronic money institution in accordance with the execution time requirements laid down in the Directive 2007/64/EC, where applicable. In any event, such funds shall be safeguarded by no later than five business days, as defined in point 27 of Article 4 of that Directive, after the issuance of electronic money.

. . .

4. For the purposes of paragraphs 1 and 3, Member States or their competent authorities may determine, in accordance with national legislation, which method shall be used by electronic money institutions to safeguard funds."

34.
As I have already mentioned, the reference to Article 9(1) and (2) of PSD1 must now be read as a reference to Article 10 of PSD2. Article 10 of PSD2 is headed "Safeguarding requirements". It provides, where relevant, as follows:

"1. The Member States or competent authorities shall require a payment institution which provides payment services as referred to in points (1) to (6) of Annex I to safeguard all funds which have been received from the payment service users or through another payment service provider for the execution of payment transactions, in either of the following ways:

(a) funds shall not be commingled at any time with the funds of any natural or legal person other than payment service users on whose behalf the funds are held and, where they are still held by the payment institution and not yet delivered to the payee or transferred to another payment service provider by the end of the business day following the day when the funds have been received, they shall be deposited in a separate account in a credit institution or invested in secure, liquid low-risk assets as defined by the competent authorities of the home Member State; and they shall be insulated in accordance with national law in the interest of the payment service users against the claims of other creditors of the payment institution, in particular in the event of insolvency;

(b) funds shall be covered by an insurance policy or some other comparable guarantee from an insurance company or a credit institution, which does not belong to the same group as the payment institution itself, for an amount equivalent to that which would have been segregated in the absence of the insurance policy or other comparable guarantee, payable in the event that the payment institution is unable to meet its financial obligations.

2. Where a payment institution is required to safeguard funds under paragraph 1 and a portion of those funds is to be used for future payment transactions with the remaining amount to be used for non-payment services, that portion of the funds to be used for future payment transactions shall also be subject to the requirements of paragraph 1. Where that portion is variable or not known in advance, Member States shall allow payment institutions to apply this paragraph on the basis of a representative portion assumed to be used for payment services provided such a representative portion can be reasonably estimated on the basis of historical data to the satisfaction of the competent authorities."

35.
Article 10 is in materially identical terms to Article 9 of PSD1. However, Article 9(1) of PSD1 read '[t]he Member States or competent authorities shall require a payment institution which provides [payment services] … to safeguard funds which have been received' whereas Article 10(1) refers to "all funds".

36.
Returning to the EMD itself, Article 11 is headed "Issuance and Redeemability". Paragraph 1 provides that a Member State "shall ensure that electronic money issuers issue electronic money at par value on the receipt of funds" and paragraph 2 provides that a "Member State shall ensure that, upon request by the electronic money holder, electronic money issuers redeem, at any moment and at par value, the monetary value of the electronic money held". Paragraph 3 provides that the contract between the EMI and the electronic money holder shall clearly and prominently state the conditions of redemption including any fees in that regard. The circumstances in which a fee may be levied in relation to redemption are set out at paragraph 4. They are: where redemption is requested before the termination of the contract; where the contract provides for a termination date and the electronic money holder terminate the contract before that date; and where redemption is requested more than one year after the date of the termination of the contract. Further, pursuant to paragraph 6, where relevant, where redemption is requested on or up to one year after the termination of the contract, "the total monetary value of the electronic money held shall be redeemed".

37.
Ms Toube also referred us to recitals 6, 42, 59, 63, 73 and 76 to the PSD2 in which reference is made to the need to ensure a "high level of consumer protection" in relation to the various activities referred to. She places particular emphasis upon the repeated references to a high level of protection

in support of her submission that the EMD requires the imposition of a statutory trust in relation to all relevant funds and that safeguarding must be ensured whether or not the EMI complies with the requirements of regulations 20 – 22 of the EMRs.

38.
She also drew our attention to the fact that recital 34 to the PSD2, where relevant, provides that ". . . The requirements for the payment institutions should reflect the fact that payment institutions engage in more specialised and limited activities, thus generating risks that are narrower and easier to monitor and control than those that arise across the broader spectrum of activities of credit institutions. In particular, payment institutions should be prohibited from accepting deposits from users and should be permitted to use funds received from users only for rendering payment services".

39.
She emphasises the distinction between credit institutions which take deposits and payment institutions, noting that it is the former which enter into a debtor/creditor relationship with their clients whereas, she says, a payment institution must segregate client funds and hold them for the client who retains beneficial ownership in the funds. This, she says, can be seen in recital 37 which provides, where relevant, that: "[P]rovision should be made for payment service user funds to be kept separate from the payment institution's funds. Safeguarding requirements are necessary when a payment institution is in possession of payment service user funds. . . ." Ms Toube submits, therefore, that an EMI is in the same position: they cannot take deposits and do not enter into a debtor/creditor relationship with electronic money holders; and the electronic money holders retain an interest in the funds received by an EMI from them or others on their behalf.

The proper interpretation of the EMD

40.
How must the EMD be interpreted in relation to the funds received by an EMI from electronic money holders?

41.
Turning to the recitals to the EMD, as I have already mentioned, Ms Toube emphasised the reference to an "appropriate level of consumer protection" in recital 11 in support of her submission that a statutory trust is necessary to fulfil the purposes of the EMD. In my judgment, the reference to an appropriate level of consumer protection takes the matter no further. It appears in a sentence which is concerned with the need for a regime for initial capital combined with one for ongoing capital and it seems to me, therefore, that on a natural reading of the recital, it relates directly to the need for such a capital regime rather than to the penultimate sentence of the recital which provides that EMIs be required "to keep the funds of electronic money holders separate from the funds of the [EMI] for other business activities." Furthermore, neither the phrase nor its context provides any indication of the appropriate level of protection which is envisaged.

42.
The same is true if the phrase should be interpreted to relate to the penultimate sentence. Furthermore, that sentence itself does not provide a clear indicator that the electronic money holder is intended to retain a proprietary interest in the funds received by the EMI. The reference to keeping "the funds of electronic money holders separate from the funds of the electronic money institution for **other business activities**" (emphasis added) makes the interpretation of the recital and the purpose of the EMD less than clear.

43.

Recital 14, however, is of more assistance, albeit that that it is in general terms. It highlights the "crucial importance" of safeguarding and refers to provisions that are "more stringent" as regards the safeguarding of the funds of an electronic money holder than those which would apply to a credit institution.

44.

What of the substantive provision itself? Article 7(1) of the EMD provides that a Member State "shall require" an EMI to safeguard "funds . . . received in exchange for electronic money that has been issued" and to do so in accordance with Article 9(1) and (2) of PSD1 which is now to be found in Article 10 of PSD2. It will be necessary to return to the proper interpretation of the phrase "funds . . . received in exchange for electronic money . . .". Suffice it to say at this stage, that if one gives the phrase its ordinary and natural meaning, it is not in itself indicative of a continued interest of the electronic money holder in the funds themselves.

45.

What are the safeguarding requirements? In this regard, it is important to note that Article 7(4) makes clear that it is for Member States or the relevant competent authority to determine, in accordance with national legislation, the method of safeguarding to be used by EMIs.

46.

Turning to the safeguarding requirements themselves, Ms Toube encouraged us to construe Article 10 in the light of the recitals in the Preamble to PSD2. As I have already mentioned, there can be no doubt that it is appropriate to construe the provisions of a directive in the light of the Preamble. However, I should sound a note of caution. Article 7 of the EMD referred to PSD1 which has since been replaced. Furthermore, the reference was for the sole purpose of safeguarding in accordance with what was Article 9(1) and (2). It is for that purpose alone that Article 7 requires one to look to and interpret the purpose and requirements of PSD1 and now PSD2. Accordingly, in my judgment, the recitals to PSD2 which are likely to be of assistance are those which may shed light on the safeguarding requirements rather than the purposes of PSD2 as a whole.

47.

This is important in the light of the fact that Ms Toube emphasised the use of the phrase "high level of protection" in the recitals to PSD2. She says that the use of the phrase militates in favour of the need for the imposition of a trust in order to fulfil the purpose of safeguarding all relevant funds. However, the phrase is used in recitals which are concerned with matters other than safeguarding. It is absent from recital 37 which does address safeguarding expressly. It seems to me, therefore, that the phrase is of little assistance in relation to interpreting the safeguarding requirements which are the sole purpose for which the reader is required to look to PSD2. In any event, it is unclear what precisely is meant by "high". It is used in many contexts. For all these reasons, I place little weight upon the phrase.

48.

This leads me to Ms Toube's submission that the safeguarding regime created by the EMD and given effect by the EMRs is materially identical to the safeguarding regime applicable to authorised payment institutions under PSD2 and implemented by the Payment Services Regulations 2017 (the "PSRs"). She says, therefore, that they should be interpreted in a materially identical manner. In this regard, she referred us to Re Supercapital [2021] 1 BCLC 355 and Re Premier FX [2021] EWHC 1321 (Ch) both of which were heard by Deputy Insolvency and Companies Court Judge Agnello QC. After an

uncontested hearing in Re Supercapital, the deputy judge found that a statutory trust arises under the safeguarding regime in the PSRs which implement PSD2. In the Premier FX case, it appears to have been common ground that the PSRs give rise to a statutory trust.

49.

Other than recitals to which I have already referred, and Article 10(1) which is incorporated by reference in Article 7 of the EMD, we were not taken to PSD2, nor were we taken to the PSRs. Of course, it is correct that the requirements for safeguarding in Article 10 apply both in the PSD2 and the EMD. However, I gain little assistance from the deputy judge's decisions. In neither case does it appear that the proposition in relation to a statutory trust was tested in argument.

50.

Since the hearing of this appeal we have also been provided with the decision of Insolvency and Companies Court Judge Burton in In the matter of Allied Wallet Limited [2022] EWHC 402 (Ch). That case was concerned with both the proper interpretation of the EMRs and the PSRs and was fully argued. In fact, Dr Mokal appeared on behalf of the FCA which intervened in the application for directions made by the joint liquidators of the company. The ICC judge decided, amongst other things, that the EMD requires the imposition of a trust over the funds received from electronic money holders and that the EMRs should be construed in that way. The ICC judge noted, however, at the end of the judgment that judgment had been handed down by David Halpern QC, sitting as a deputy high court judge in this matter, and that he had found the opposite. It was accepted that the ICC judge was bound by the deputy High Court judge's decision.

51.

Although the Allied Wallet Limited matter was concerned with both the EMRs and the PSRs, it appears that the central issue of whether a statutory trust arises in relation to relevant funds was considered and that much of the argument which the ICC judge heard was very similar if not the same as the way in which the matter was put before us. I derive no great assistance from it.

52.

What of the nature of the safeguarding which is spelt out in Article 10(1)? Ms Toube submits that the PSD2 and therefore, the EMD and the EMRs require the EMI to segregate the funds, prohibit it from making use of those funds which it receives from an electronic money holder for its own purposes and require those specific assets to be used or particular purposes. She submits therefore, that the funds are trust property.

53.

She relies upon Ayerst (Inspector of Taxes v C & K (Construction) Limited AC 167 per Lord Diplock at 177G-H and 178C-F with whom Viscount Dilhorne and Lords Kilbrandon and Edmund-Davies agreed. That was a case in which the House of Lords considered the question of whether when a company is ordered to be wound up under the Companies Act 1948 the effect of the winding up order is to divest the company of the "beneficial ownership" of its assets within the meaning of that expression as it is used in section 17(6)(a) of the Finance Act 1954. Having considered a number of cases concerning the status of a company's assets on winding up, Lord Diplock noted at [180E-F] that in those cases all that was intended to be conveyed by the use of the expression "trust property" and "trust" . . . was that the effect of the statute was to give to the property of a company in liquidation that "essential characteristic" of trust property which was that "it could not be used or disposed of by the legal owner for his own benefit but must be used or disposed of for the benefit of other persons" [180F].

See also the Lehman case in the Supreme Court at [189] per Lord Collins. Ms Toube says that the same is true here.

54.
Does Article 7 of the EMD prohibit the EMI from using or disposing of specific assets for its own purposes and require it to apply them for a particular purpose?

55.
First, it is important to bear in mind that the funds which are required to be segregated by Article 10(1)(a) are, in fact, a fluctuating pool. The original funds which are received are not set aside. As Ms Toube accepted, the amount which must be safeguarded on any day is not the original amount received from electronic money holders. It is the net amount. In other words, it is the sum equivalent to that which has not already been used in transactions by the electronic money holder from time to time.

56.
Secondly, it is important to note that Article 7 requires the funds to be safeguarded in either of two, if not three ways and it is for Member States or their competent authorities to determine which method or methods shall be used. They are: the segregation of funds in the hands of the EMI upon receipt and thereafter by deposit with a credit institution or the purchase of liquid low-risk assets which must occur by the end of the business day after receipt, and which must be insulated in the event of insolvency in accordance with Article 10(1)(a); or the issuance of an insurance policy or guarantee for an amount equivalent to that which would have been segregated, the policy/guarantee being payable in the event that the EMI is unable to meet its financial obligations (Article 10(1)(b)). This is important.

57.
The alternative of an insurance policy or guarantee which may be chosen by a Member State as the only means of safeguarding to be implemented in national law does not require any funds to be set aside or segregated in any way. To the contrary, instead of keeping funds separate, it is open to an EMI to use them in its business as it thinks fit as long as there is an insurance policy or guarantee in place, for an amount “equivalent” to the amount which would have been segregated. The funds do not even have to be used to meet the premiums on the policy or cost of the guarantee. They are merely “covered by an insurance policy or some other comparable guarantee . . .” The EMI, therefore, is not precluded from making use of the funds for its own purposes in all circumstances. This is contrary to the characteristics of trust property described by Lord Diplock.

58.
Furthermore, if Article 10(1)(b) is interpreted in accordance with the principles of EU law, it contains no indication that the electronic money holder has any proprietary right to the insurance policy/guarantee or its proceeds. To the contrary, it states that the funds shall be “covered” by an insurance policy/guarantee which shall be for an amount “equivalent” to that which would have been segregated. Ms Toube says that the answer to this is that, nevertheless, in order to satisfy the purposes of the EMD the policy/guarantee and its proceeds are required to be held on trust. In my judgment, that assumes what it seeks to prove.

59.
In relation to the need to impose a trust of both the segregated funds and the insurance policy, Ms Toube referred us to the Lehman case in general and to a passage in the judgement of Lord Neuberger MR in the Court of Appeal, in particular. That was a case in which client money was

provided to an investment firm subject to the requirements of Directive 2004/39/EC on Markets in Financial Instruments. Article 13(8) provided that an investment firm when holding funds “belonging to clients” must “make adequate arrangements to safeguard the clients’ rights and . . . prevent the use of client funds for its own account”. In addition, Article l6(1) of the (then) Directive 2006/1731/EC, implementing MiFID (“MiFID-I”) required client money to be segregated and separately identifiable from the investment firm's own money and Article l6(2) provided that:

“If, for reasons of the applicable law, including in particular the law relating to property or insolvency, the arrangements made by investment firms...to safeguard clients' rights are not sufficient to satisfy the requirements of Article... 13(8) of [MiFID], Member States shall prescribe the measures that investment firms must take in order to comply with those obligations.”

60.
In England, the MiFID and MiFID-I obligations concerning client money were given effect, in part, by the (then) section 139(1) of the Financial Services and Markets Act 2000, (“FSMA”) which authorised the (then) Financial Services Authority (“FSA”) to implement rules imposing a trust in relation to client money. It was not in dispute that the funds were subject to a statutory trust imposed by CASS 7, made under section 139 of FSMA. The questions with which Briggs J (as he then was), the Court of Appeal and ultimately, the Supreme Court were concerned were when exactly the investment firm became a trustee of client money for its clients and the manner in which those funds were to be distributed on the administration of the investment firm. See Arden LJ at [1].

61.
The Court of Appeal held that, given the imperative to provide full effect in English law to MiFID requirements, a trust must have arisen as soon as client money was received by the firm, and not merely once the firm complied with the segregation duty. Lord Neuberger MR (with whom Arden LJ and Sir Mark Waller agreed) observed at [196] – [199] that:

“196. Secondly, it is argued that the creation of a trust before segregation would represent an improvement on the protection required to be afforded by MiFID, which would be ruled out by article 4(1) of the Implementing Directive, which states that a member state “may retain or impose requirements additional to those in this Directive only in [specified] exceptional cases”.’

197. In my view, that is not a good point. It is true that article 16(1)(e) of the Implementing Directive requires client money to be held in accounts separate from those containing the firm’s money and says nothing about trusts. However, article 16(2) states that if compliance with article 16(1) would not be “sufficient to satisfy the requirements of article 13(7) and (8) of [MiFID], member states shall prescribe the measures that . . . firms must take in order to comply with those obligations”. Article 13(7) of MiFID requires member states to make “adequate arrangements so as to safeguard clients’ ownership rights, especially in the event of the . . . firm’s insolvency, and to prevent the use of a client’s instruments on own account”. It is also relevant on the issue of timing to mention that article 18(1) of the Implementing Directive requires funds received from clients to be “promptly” placed into an appropriate account.’

198. Until client money is segregated, it therefore seems to me to be positively in accordance with the two Directives to provide that it is subject to the statutory trust, as Briggs J said: see [2009] EWHC 3228 (Ch) at [148]. Indeed, segregation of client money on its own does not protect it in English law in the event of a firm’s insolvency, as Professor Gower pointed out in his Review of Investor Protection, Report: Part 1 (1984) (Cmnd 9125), so the imposition of a trust is appropriate in any event. Accordingly, without the imposition of a trust the segregation required by article 16(1) of the

Implementing Directive would not achieve the protection required by article 13(7) and (8) of MiFID; so the imposition of a trust seems to me to be positively required by article 16(2) of the Implementing Directive.'

199. It is true that the Directives nowhere refer to the creation of a trust, but that seems to me to be irrelevant. The Directives are intended to apply across the European Union to all member states, and the concept of a trust is not familiar even in Scotland, let alone in other civil law jurisdictions. Indeed, the different legal systems explain why [MiFID-I] includes article 16(2). Quite apart from this,…the prohibition on a firm using client money for its own purposes is enough to create a trust in English law, so article 13(8) of MiFID, rather like M. Jourdain speaking prose without realising it, appears to ensure the creation of a trust without appreciating it."

62.
It seems to me that this case is substantially different. The regulations pursuant to MiFiD contained the imposition of an express trust. As Lord Collins described it in the Supreme Court, the starting point was the wording in CASS7.7.2R which expressly provides that "a firm receives and holds client money as trustee . . ." [190]. The question was when that trust relationship arose. Furthermore, Lord Neuberger's obiter dicta arose in the context of the argument that the imposition of a trust would improve the protection required under MiFID and in the light of the requirements of articles 13 and 16 of MiFID. They contained express reference, amongst other things, to "client ownership rights", the obligation to make adequate arrangements to safeguard clients' ownership rights, especially on insolvency (article 13(7) and the need to prescribe measures in order to comply with article 13(7) and (8). It seems to me, therefore, that Lord Neuberger MR's obiter dicta at [199] must be viewed in the context in which they arose. I do not dissent from the proposition that a trust may arise without being expressly referred to. It depends, however, on the content and purpose of the articles in question.

63.
Returning to the EMD, it is important to read and interpret Article 10(1) as a whole and in context of Article 7. The funds which are referred to in both articles are those which have been received. Article 10(1)(a) provides that they must not be commingled at any time other than with the funds of other electronic money holders "on whose behalf the funds are held" and, to the extent not spent by the end of the following business day after receipt, shall be deposited in a separate account or invested in secure, liquid low-risk assets. Article 10(1)(a) goes on, however, to provide that : ". . . **they** shall be **insulated in accordance with national law** in the interest of the payment service users **against the claims of other creditors** of the payment institution, in particular **in the event of insolvency**" (emphasis added).

64.
Mr Watson on behalf of the Administrators says that regulation 24 of the EMRs provides that insulation. Ms Toube on the other hand submits that the insulation required can only properly be effected by means of a statutory trust in English law. She also submits that although regulation 24 could have amended the priorities under the Insolvency Act 1986, it did not do so.

65.
In my judgment, if Article 10(1)(a) is read as a whole, it is clear that is mandated is that "they" shall be insulated against the claims of other creditors in the event of insolvency. The protection or insulation afforded is as against the creditors of the EMI. It does not address the position of electronic money holders or the funds which they have paid over to the EMI in all circumstances or for all purposes. Article 10(1)(a) requires, therefore, that a Member State ensure that the funds are

insulated in national law against the claims of the persons mentioned, in the circumstances referred to and no more.

66.
It seems to me to be clear, therefore, that the purpose of Article 10(1) when read in the context of Article 7 is not to create more extensive rights than those specifically identified, namely rights superior to other creditors in an insolvency. There is nothing in Article 7 to suggest that the insulation must be in respect of everyone, including third parties. Article 7 does not require the funds to be insulated against the world in all circumstances. A trust would apply in circumstances other than insolvency and would have wider ramifications. Furthermore, it would create rights and remedies against third parties other than the creditors of the EMI.

67.
In addition, in my judgment, the existence of the alternatives in Article 10(1)(a) and (b) is contrary to Ms Toube's submissions to the effect that funds received from electronic money holders are held to their order or, to put the matter another way, that they retain the equitable interest in the funds. Had Article 10 required solely that the relevant funds be kept separate and be held on behalf of the electronic money holder to his order or for a particular purpose, there may have been a strong argument in favour of the need for the imposition of a trust in order to fulfil the purposes of the EMD. That is not the case. If there were a block policy or guarantee with a sufficient limit in place at the moment of receipt, an obligation to segregate would never arise at all: the EMI would be free to use the received funds as it pleased.

68.
It also seems to me that Article 11 of the EMD is consistent with such an analysis. Paragraph 2 provides that upon request, the electronic money holder must be able to redeem at par value the "monetary value of the electronic money held" and that there may be contractual terms as to the conditions of redemption including any fees relating to it. Such provisions are entirely contrary to the continued existence of an equitable interest in the funds. The fact that paragraphs 3 and 4 contemplate the imposition of a fee in respect of redemption in certain circumstances is also contrary to an electronic money holder retaining a proprietary interest in those funds. Furthermore, the reference to a right exercisable up to one year after the contract has terminated (paragraph 6) is also contrary to an analysis under which the electronic money holder retains an interest in funds held for the holder's purposes.

69.
In my judgment, the existence of the alternatives and the nature of the alternative in Article 10(1)(b), together with the natural and ordinary meaning of Article 10(1)(a) when read as a whole and interpreted in accordance with EU law, are inimical to the need for the imposition of a trust in order to satisfy the purposes of the EMD. It is clear, therefore, that it is not necessary to impose a statutory trust in order to fulfil the purposes of the EMD and Article 10(1) of the PSD2. Article 10 and therefore, Article 7 is concerned solely with protection in the case of insolvency and against the other creditors of the EMI and not the world in general and does not require the EMI to hold the electronic money holder's funds to fulfil a particular purpose.

70.
I come to this conclusion despite Ms Toube's submissions in relation to the extent of the funds which are the subject of the safeguarding provisions. In summary, she submits that one must interpret Article 7 of the EMD, incorporating Article 10 of the PSD2, in a way which provides protection not

only in relation to funds which may have been segregated pursuant to Article 10(1)(a) or which may be covered by an insurance policy under Article 10(1)(b) but also in respect of funds which have not been protected in either way. She says if this were not the case, the safeguarding provisions would provide no real protection at all. This, she says, is another reason why it is necessary to impose a trust in order to fulfil the purposes of the Directives.

71.
In this regard, she drew our attention to the difference in approach between Briggs J (as he then was) and Arden LJ in the Lehman case. At [62], Arden LJ set out a passage from the judgment at first instance to the effect that nowhere in the directives with which the judge was concerned was there an obligation to provide legal protection to clients' securities, funds or their rights in the event of non-compliance by firms. Arden LJ took issue with the suggestion that the MiFID Directives and CASS 7 proceeded on the assumption that there would be full compliance. She pointed out that the MiFID Directives were concerned with safeguarding client assets and that concern assumes that there is a risk that they will be lost and that in the real world it could not be assumed that the risk of loss would be entirely eliminated by imposing the organisational requirements in the MiFID Directives. She also pointed to indicators in the MiFID Directives and CASS 7 which reveal a concern about non-compliance and in CASS 7 express contemplation of that position. She concluded, therefore, at [63] that she did not consider that in general it was appropriate to interpret CASS 7 on the basis that the drafter assumed compliance.

72.
This point was addressed by Lord Walker (who was in the minority) and Lord Dyson (who was in the majority) in the Supreme Court. At [48] Lord Walker disagreed with Arden LJ and stated that the MiFID Directives and CASS 7 assume compliance and do not address non-compliance at all. Lord Dyson noted at [148] as follows:

"Lord Walker is of the view that, in construing CASS 7, we have to look at its essential scheme and structure. Beyond that, he says, a purposive approach gives little assistance, since it is plain that neither the directives nor CASS 7 contemplate non-compliance with regulatory requirements (see [48] and [81], above). But even if the premise that the directives did not contemplate non-compliance with regulatory requirements is correct, it does not follow that rules introduced by member states to give effect to the directives should not be construed in the manner which best fulfils the overriding purpose of the directives to provide a high degree of protection to money entrusted by clients to investment firms. If there are two possible interpretations of CASS 7, it seems to me to be axiomatic that the interpretation which more closely meets the purpose of the directives should be adopted. I do not see how this can be affected by whether the directives did or did not contemplate non-compliance with the regulatory requirements.'

73.
Ms Toube's submission is, she says, relevant in two ways. First, one should not assume that the safeguarding measures in Article 10 will be adhered to and protection should, nevertheless, be provided for funds which have not been segregated; and secondly, once one accepts that to be the case, the purpose of the Directives can only be fulfilled by the imposition of a trust.

74.
It seems to me that the difference in approach between Briggs J and Arden LJ matters little in our case. It turned on a difference of opinion about the wording of the MiFID Directives and CASS 7, with Arden LJ's approach doubted in the Supreme Court. As Lord Dyson pointed out, the correct approach

requires one to concentrate upon the purpose of the directives in question and the proper interpretation of the relevant regulations. What is the purpose of the Directives and the proper interpretation of the EMRs? Are they to be construed to mean that if funds have not been dealt with properly under the safeguarding options, they are, nevertheless, protected on the insolvency of the EMI and if so, by what means?

75.
The purpose of Article 7 (incorporating Article 10) is to be ascertained from the natural and ordinary meaning of the words used in context and in the light of the EMD as a whole, interpreted in accordance with the principles of EU law. The EMI is required to safeguard the funds received from electronic money holders in exchange for electronic money. The same wording was contained in Article 9 of PSD1. Article 10 of PSD2 refers to the requirement to "safeguard all funds". Although there may be a nice argument about the status of funds before electronic money is issued in exchange for them, it seems to me that if one reads Article 7 together with Articles 9 and 10 the position is clear. The safeguarding requirements should be interpreted to cover all funds received.

76.
The protection to be provided is the insulation on an insolvency described in Article 10(1)(a). It provides expressly for the need to insulate the interests of electronic money holders against the claims of other creditors of the EMI on its insolvency in accordance with national law. Accordingly, it contemplates a change in priorities on insolvency if necessary.

77.
The fact that Article 7 addresses the position in relation to funds received, does not alter the nature of the insulation which Article 10 requires. As I have already mentioned, it seems to me that the protection which would be afforded were the funds to be the subject of a trust, would exceed that which is contemplated in Article 10(1)(a). That must be the same in relation to any funds which were not dealt with in compliance with Article 10(1)(a) or (b). Although non-compliance will, no doubt, create practical complications on an insolvency, that cannot be a reason to extend the natural meaning of the express form of insulation set out in Article 10(1)(a) and impose a trust.

How should the EMRs be interpreted in the light of the interpretation and purpose of the EMD?

78.
The EMRs must be interpreted in accordance with domestic law principles in the light of the meaning of the Directives in order to achieve conformity with the provisions and principles of the EMD. I have already concluded that the purposes of the EMD do not require the imposition of a statutory trust. The question is, therefore, whether the EMRs do so nevertheless and whether they otherwise implement the EMD. If they do not, it will be necessary to adopt the approach endorsed by Lord Dyson in the Lehman case at [131].

79.
It seems to me that the EMRs, properly construed in the light of the EMD and PSD2, do not impose a statutory trust in relation to funds received from electronic money holders. There are numerous indicators to that effect. As Mr Watson on behalf the Administrators points out, the definition of "electronic money" in regulation 2(1) of the EMRs does not fit naturally with the imposition of a statutory trust in relation to the relevant funds. It refers to the "electronically . . . stored monetary value as represented by a claim on the electronic money issuer . . . ". Although the use of "a claim" is not definitive, it seems to me that the definition would have been framed differently were it intended

that the electronic money holder should retain an equitable interest in the funds delivered to the EMI. A "claim on the electronic money issuer" is more apt to describe contractual rights. However, I do not place a great deal of weight on the definition.

80.
There are a number of substantive provisions which also point away from the creation of a statutory trust. For example, just as in Article 11 of the EMD, under regulation 39, at the request of the electronic money holder, the EMI must redeem the electronic money at par value. There is no requirement that the electronic money holder must be paid out of the "relevant funds" or that the holder is entitled to any increment on the funds whilst they have been held by the EMI, as would be the case were they trust funds or that the holder is entitled to the traceable proceeds of the relevant funds. Furthermore, it is clear from regulations 40 and 41 that fees may be charged upon redemption and regulations 42 and 43 place time limits on the right of redemption. After six years the right to redemption is lost altogether.

81.
The same is true of regulation 20(3). It provides that "Where the precise portion of funds provided by a customer which are attributable to the payment transaction is variable or unknown, the relevant funds are such amount as may be reasonably estimated . . . to be representative of the portion attributable to the execution of the payment transaction". Estimation and a representative portion are contrary to a proprietary interest in the funds themselves.

82.
Regulation 72 provides another indicator. Were funds held on trust, it seems to me that regulation 72 would have been drafted differently. It would have made clear that the loss to which it refers was in excess of what might otherwise be recovered in breach of trust. Furthermore, it would make clear that the defences applying to a breach of statutory duty to which it refers, relate solely to the recovery of the excess or are otherwise in addition to the provisions of section 61 Trustee Act 1925 which provides a defence to a trustee.

83.
The structure of the safeguarding regime is also contrary to the existence of a statutory trust. Regulation 20(1) provides that EMIs must safeguard funds received "in exchange for" electronic money that has been issued" in accordance with the one of the three alternatives set out in regulations 21 and 22. They mirror Article 10(1)(a) and (b) of PSD2. They are: (i) placing the funds in a separate account that the EMI holds with an authorised credit institution (regulation 21(2)(a)); (ii) investing the relevant funds in secure, liquid, low-risk assets and placing those assets in a separate account with an authorised custodian (regulation 21(2)(b)); or (iii) ensuring that the funds are covered by an appropriate guarantee or insurance policy payable in the event of insolvency (regulation 22).

84.
The analysis of these provisions is identical to that of Article 10(1)(a) and (b) of the PSD2 to which I have already referred. The first alternative is not necessarily inconsistent with the existence of a trust. However, mere segregation is insufficient to create a trust (the Lehman case per Lord Collins at [186] supra). Furthermore, regulation 21(4) provides that no person other than the EMI may have an interest or right over the relevant funds or the liquid low-risk assets placed in the account referred to in regulation 21(2), "except as provided by this regulation". Contrary to Ms Toube's submission, there is nothing in the regulation which can be construed to mean that "except as provided by this

regulation" is a reference to an equitable right in the electronic money holder to the funds or low risk assets.

85.
I agree with the judge that the first and second alternatives are clearly contrary to the existence of a statutory trust. If the electronic money holders were intended to retain a proprietary interest in the funds consistent with a statutory trust, they would be entitled to interest on the deposits or any increase in value of the investments, whereas the EMRs do not so provide, nor could they, in relation to interest at least, in the light of the EMD.

86.
The third alternative is perhaps the most inconsistent with the existence of a statutory trust. One might ask to what does the trust relate? Ms Toube submits that it is the insurance policy or guarantee which becomes subject to the trust. I have already considered that submission in relation to Article 10 of the PSD2. In any event, in the context of the EMRs, such an interpretation is also inconsistent with the terms of regulation 22(2) which is in similar to terms to regulation 21(4). There is nothing in regulation 22 which can be construed to mean that the electronic money holder obtains an equitable right to the policy/guarantee or its proceeds.

87.
It also seems to me that the creation of a statutory trust would be inconsistent with the terms of regulation 24 which takes effect if there is an insolvency event. It would also render the regulation all but purposeless.

88.
What then of the second ground of appeal? Was the judge wrong to interpret the definition of "asset pool" in regulation 24 of the EMRs to include a sum equal to all relevant funds which ought to have been but may not have been safeguarded under Option 1 or Option 2 set out in regulations 21 and 22 respectively?

89.
Both Ms Toube and Mr Watson submitted that the definition of "asset pool" in regulation 24 of the EMRs should not be construed or re-written to include funds which had been received but had not been safeguarded because of the effect which this would have on other creditors, including secured creditors. They also emphasised the difficulties which it might cause in relation to the fees which an insolvency practitioner may charge in order to realise assets in the insolvent estate and drew attention to the limited extent of the priority granted by regulation 24(2).

90.
I have already decided, however, that: the EMD does not require the imposition of a statutory trust (see above, [69]); and the EMRs do not impose such a trust (see above, [79]); but that the EMD requires all funds received by EMIs from electronic money holders to be safeguarded (see above, [75]), not merely those which have been safeguarded in accordance with Article 10 of the PSD2. It follows, therefore, that in order to fulfil the requirements of the EMD and in order to interpret the EMRs in conformity with the Directives, "asset pool" in regulation 24 must be given a wider meaning than merely such funds as have been so safeguarded. As the judge stated at [54] of his judgment, "asset pool" must also include a sum equal to such relevant funds which ought to have been but have not been safeguarded in accordance with regulations 21 and 22.

91.

As I have already mentioned, Ms Toube emphasised the difficulties which she says would be caused by such an interpretation including the detrimental effect that such an interpretation would have on other creditors on an insolvency. It seems to me that that so-called detrimental effect is no more than the inevitable consequence of a provision which seeks to insulate and protect the claims of electronic money holders in relation to the equivalent of all relevant funds. Once that it is accepted, the perceived detrimental effect melts away.

92.
I should add that given the proper interpretation of "asset pool" includes relevant funds which have not been properly safeguarded, in order to achieve conformity with the purposes of the EMD, in my judgment, it is also necessary, as a consequence, to interpret "costs of distributing the asset pool" in regulation 24(2) so as to include the costs of making good the asset pool in circumstances where relevant funds, or some of them, have not been safeguarded. These are administrative costs associated with the asset pool itself. Such an interpretation falls within the breadth of the approach to interpretation approved by Lord Dyson in Lehman at [131].

93.
Ms Toube also says that regulation 24 cannot affect the order of priorities on an insolvency because that would entail an amendment to the Insolvency Act 1986 (the "1986 Act") which the EMRs do not purport to effect. Accordingly, she submits that the regulation should not be construed to be any more than an administrative provision in support of a statutory trust of the relevant funds. I have already decided that a statutory trust does not arise. I also take a different view about the nature and status of the regulation.

94.
As Mr Watson stated in the additional written submissions which we requested from the parties after the hearing, regulation 24 creates a bespoke statutory regime in relation to the asset pool. The electronic money holders are granted rights over that pool in priority to other creditors by virtue of the express wording of regulation 24(1)(a). Those rights might best be analysed as a secured interest over the asset pool once it is interpreted in the light of the EMD. Further, in my judgment, that secured interest, like any other, applies before the waterfall under section 175 of the 1986 Act and stands outside it. There was no need to amend the 1986 Act, therefore, or for the EMRs to make express reference to it. The statutory regime under the 1986 Act applies after distribution has taken place under regulation 24.

95.
It seems to me that regulation 24(2) is consistent with that analysis. It makes clear that the asset pool is intended to stand apart from the normal insolvency regime and should only bear the costs associated with distributing it (and as I have explained, if necessary, the costs of reconstituting it). The electronic money holders' claims are not to be subject to the priority of expenses of an insolvency proceeding.

96.
I should add that I consider that the EMRs are, in any event, capable of amending or overriding the 1986 Act were that necessary,+ even though no reference is made to such an amendment. That is the effect of section 2 of the European Communities Act 1972 (the "ECA"). It provides, where relevant, as follows:

"

. . .

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—

(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid.

In this subsection "designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

. . .

(4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council or orders, rules, regulations or schemes."

97.
Section 2 of the ECA was considered in Oakley Inc v Animal Ltd [2005] EWCA Civ 1191, [2006] Ch 337, which was described by Lord Mance as the 'leading authority' on the ambit of s 2(2) ECA 1972 in United States of America v Nolan [2015] UKSC 63, [2016] AC 463, at [53]. Both the Oakley and the Nolan cases have most recently been referred to with approval in the Supreme Court in Villiers v Villiers [2020] UKSC 30, [2021] AC 838, at [144]. That case was concerned with section 2(2)(b) of the ECA, however.

98.
The specific question in Oakley was whether regulation 12 of the Registered Design Regulations 2001, issued by the Secretary of State under s 2(2) of the ECA in order to implement Directive 98/71/EC on the legal protection of designs, fell within the scope of s 2(2)(a) – in other words, whether it was for the purpose of implementing an EU obligation or enabling one to be implemented. The Directive required EU member states to approximate their legislation on the protection designs, but provided an option permitting them to derogate and retain in force existing legislation for registered designs (art 11(8)). Regulation 12 did just this: it provided that the Registered Designs Act 1949 (as amended in 1988) would continue to apply in relation to designs already registered, as regards their

cancellation or invalidation. It was held at first instance that this could only be achieved by means of primary legislation.

99.
The Court of Appeal held unanimously that regulation 12 fell within the ambit of s 2(2)(a) ECA. They also expressed wider views about its scope. For example, Waller LJ noted at [20]:

"Section 2(1) brings into force "rights, powers, liabilities, obligations and restrictions" which are without further enactment to be given legal effect i e laws of the European Union to which direct effect must be given. By section 2(2)(a) Parliament provides machinery for implementing results which under article [288 TFEU] it is bound to achieve. It is concerned with the implementation of Community obligations which are defined as any obligation "created or arising by or under the treaties" i e directives and obligations flowing from directives. In so far as the United Kingdom uses secondary legislation under section 2(2)(a) to bring into force Directives it does not seem to me to be meaningful to talk in terms of narrow construction or otherwise; the regulations are bringing into force that Directive and obligations flowing from that Directive, and the correct approach is to construe the regulations by reference to the directive which is being introduced."

Further, Jacob LJ explained section 2 ECA in the following way:

"61. … Section 2(2) which is clearly designed with directives in mind, allows implementation by a statutory instrument … However certain things (those in Schedule 2 e g taxation) can only be implemented by Parliament. This is because section 2(2) opens with the words 'Subject to Schedule 2 to this Act'.

62. Given that structure of the 1972 Act, the deputy judge's conclusion, that non-Schedule 2 derogations provided for in a directive can only be implemented by an Act of Parliament is startling and, to my mind, obviously wrong. In 1972 Parliament itself decided what to reserve to itself. It must have known that directives frequently contained options and frequently left details of implementation to member states. That is the key difference between a directive and a regulation …

63. In short, the fact that Parliament did not reserve to itself optional or discretionary matters in a directive to itself is conclusive in this case. Such matters as a generality were not put into Schedule 2. And if they had been, there would hardly be a directive which could be complied with, at least in part, save by an Act of Parliament. Parliament cannot have intended that.

64. Further, however, the language of section 2(2)(a) – 'for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented' – does not begin to suggest any limitation on the power to implement a Directive. On the contrary it is 'for the purpose of' and 'enabling'.

. . .

70. … [the ECA] is a sui generis piece of legislation whose general purpose, bringing into our law European Community law, is paramount. It seems to me that the approach to the regulation-making power should be driven by that idea, given that the United Kingdom's obligation under the EC Treaty is to 'take all appropriate measures … to ensure fulfilment of the obligations … resulting from action taken by the institutions of the Community': article 10."

100.

Furthermore, Lord Mance observed in the Nolan case at [62] that: "it is … possible to describe section 2(2) as both wide and confined in scope. It is wide because it authorises almost every conceivable provision required to fulfil the United Kingdom's obligations under article [4(3) TEU: 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'] (or to give effect to any EU right) subject only to the restrictions in Schedule 2. It is confined because any such provision must be for the purpose of implementing, or dealing with a matter arising from or related to, such an obligation or right."

101.
It seems to me, therefore, that the power conferred by s 2(2) of the ECA to implement EU obligations by secondary legislation, even where this entails modifying the application of an existing Act of Parliament in an area that the directive touches, is very broad.

102.
Regulation 24 of the EMRs must be construed as the means chosen to implement the insulation provisions in Article 10 of the PSD2 as incorporated in Article 7 of the EMD. If it requires a change in priorities under the 1986 Act (which I do not consider to be necessary) it seems to me that the powers conferred by s 2(2) and (4) of the ECA to make "any such provision (of any such extent) as might be made by Act of Parliament" in order to implement an EU obligation would apply, despite the fact there is no express reference to any amendment to the 1986 Act.

103.
This conclusion finds further support in the principle of "implied repeal", defined by Laws LJ at [37] of Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), [2003] QB 151 as "the rule … that if Parliament has enacted successive statutes which on the true construction of each of them make irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the later" (Thoburn was cited with approval by the Supreme Court in R (Miller) v Secretary of State for Exiting the European Union [2019] UKSC 22, [2020] AC 491 at [66] – [67]).

104.
This principle, it seems to me, should likewise be capable of applying to a provision contained in secondary legislation, made under the broad powers conferred by "a sui generis piece of legislation whose general purpose, bringing into our law European Community law, is paramount" (Jacob LJ in Oakley at [70], above); and which enables the creation of "any such provision (of any such extent) as might be made by Act of Parliament" for that purpose (emphasis added).

105.
Whether a given provision contained in secondary legislation (expressly or impliedly) amends or disapplies an ostensibly competing provision contained in a statute, of course, turns on a proper construction of the primary and secondary legislation in question, as well as the nature and scope of the relevant power-conferring rule. If I am wrong about regulation 24 operating as a bespoke statutory regime creating rights over the asset pool which operate before the waterfall in section 175 of the 1986 Act, I would decide, nevertheless, that regulation 24 is capable of impliedly effecting the amendment or disapplication of those provisions that would otherwise apply to determine the priority of claims in an EMI's insolvency.

106.
It seems to me, therefore, that one way or the other, there is nothing in Ms Toube's point.

107.

For all the reasons to which I have referred, I would dismiss both the appeal and the cross-appeal.

Lord Justice Popplewell:

108.

I agree.

Lord Justice William Davis:

109.

I also agree.